

November 13, 1997

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION:

- A. SEPA THRESHOLD DETERMINATION APPEAL**
- B. SHORT PLAT APPEAL**

SUBJECT: King County Department of Development and Environmental Services
File No. **L94S0083**

BUCHAN HOMES

Threshold Determination Appeal and Short Plat Appeal

Location: Property located approximately 90 feet north of the intersection of
258th Avenue Northeast and Northeast 10th Street, southeast of the
City of Redmond

Applicant: Ralph Gregory, Buchan Homes, *represented by:*
Christopher I. Brain, Tousley Brain, Attorneys at Law
700 Fifth Avenue, 56th Floor, Seattle, WA 98104-5056

Appellant: **Steven Gula**, 1018 – 254th Avenue Northeast, Redmond, WA 98053

Department Department of Development and Environmental Services
Land Use Services Division, *represented by:*
David Sandstrom and **Angelica Velasquez**
Site Plan Review Section SEPA Section

SUMMARY OF RECOMMENDATIONS:

Division's Preliminary:	Deny the appeals
Division's Final:	Deny the appeals
Examiner:	Appeals denied

PRELIMINARY MATTERS:

Date of Short Plat Application:	December 22, 1994
Issuance of Threshold Determination of Nonsignificance:	March 12, 1996
Appeal of Threshold Determination of Nonsignificance:	March 18, 1996
Preliminary Short Plat Application Approval:	July 11, 1997
Appeal of Preliminary Short Plat Application Approval:	July 21, 1997

EXAMINER PROCEEDINGS:

Pre-Hearing Conference I:	June 14, 1996
Pre-Hearing Conference I, cont.:	September 9, 1997
Pre-Hearing Conference II:	September 30, 1997
Hearing Opened:	October 24, 1997
Hearing Closed:	October 24, 1997

ISSUES ADDRESSED:

- Wetlands
- School enrollment impact
- Air quality
- Drainage:
 - downstream erosion
 - downstream flooding
 - downstream geologic stability
 - downstream water quality
- Safe walking conditions
- Emergency access (see, “downstream flooding”, above)

FINDINGS, CONCLUSIONS AND DECISION:**FINDINGS:**1. General Information.

Applicant:	Buchan Homes, 2821 Northup Way, Suite 100 Bellevue, WA 98004
Appellant:	Steven Gula P.O. Box 2373 Redmond, WA 98073-2373
STR:	SE 26-25-06
Location:	Property located approximately 90 feet north of the intersection of 258 th Avenue Northeast and Northeast 10 th Street, southeast of the City of Redmond
Zoning:	AR 2.5 application vested to AR 2.5 – P zoning current zoning RA 5 - P
Acreage:	14.85 acres
Number of Lots:	4
Proposed Use:	Single-family residences
Sewage Disposal:	Individual on-site sewage systems
Water Supply:	Sammamish Plateau Water and Sewer District

2. Proposal. John F. Buchan Construction, Inc. (the Applicant) proposes to develop a 4-lot short subdivision for attached single-family residential construction near the residence of Steven Gula (the Appellant). The property in question comprises 14.85 acres which are classified AR 2.5 for purposes

of this application review.¹ The Applicant proposes individual on-site sewage systems with water provided by the Sammamish Plateau Water and Sewer District. The subject property is also known as “Tract A, Plat of Cross Creek”. Access to the subject property is obtained via Northeast 8th Street, then 258th Avenue Northeast.

3. Application History; Appeals Filed. The proposed short subdivision was granted preliminary approval (with conditions) on July 11, 1997. Ten days later, Mr. Gula filed timely appeal. His appeal from the Department’s threshold determination of nonsignificance (DNS) for the proposal had been filed in 1996. Review of that appeal was postponed upon agreement of the parties until the instant consolidated review could be conducted.
4. Appeal Issues. These are the issues presented by the Appellant regarding both short sub-division compliance with applicable code and the defensibility of the Department’s negative threshold determination. These are the substantive issues of this review, as established by the Examiner’s pre-hearing order:
 - A. Was the Department’s threshold determination biased by an inappropriate use of the term “unregulated” wetlands?
 - B. Have school enrollment impacts been properly addressed?
 - C. Has the additional carbon monoxide exposure which may result from the proposed development been appropriately considered?
 - D. Have erosion, landslide and water quality hazards been appropriately considered in the drainage review?
 - E. Will the proposed development comply with the RCW 58.17.110 review standard which addresses “safe walking conditions” for students who only walk to school?
 - F. Has the Department appropriately considered the emergency access implications of having only one access route (NE 8th Street) and the potential for flooding along that route?

These issues are addressed in the findings which follow.

5. Wetlands. The term “unregulated” wetland appears to be an informal Departmental term used to describe those wetlands which, due principally to size and “rural” designation, are not regulated pursuant to KCC Title 21A. However, due to vesting, the proposed development is regulated by KCC Title 21, in which all wetlands are regulated. The evidence of record shows that the Department’s senior ecologist reviewed the proposed development pursuant to KCC Title 21 and applied its regulations to the proposed development, resulting in appropriate mitigation measures to address impacts on those wetlands.
6. School Enrollment. Pursuant to RCW 82.02, which authorizes local jurisdictions to charge impact fees, and provides guidelines for doing so, the Lake Washington School District and King County have entered into an agreement whereby mitigation impact fees are determined and assessed for each single-family dwelling developed within the District’s boundaries. In this District at this time, the school enrollment impact fee is \$2,776 for each single-family dwelling developed. The statute

¹ The application is vested pursuant to AR 2.5, due to application date. Current zoning is RA 5-P. The Applicant initially submitted this application on December 22, 1994.

authorizes this mitigation fee payment schedule as a SEPA school enrollment impact mitigation measure.

In King County, pursuant to KCC 27.44, school enrollment impact mitigation payments are paid at the building permit stage, not at the plat approval stage. In addition, the impacts of school enrollment may be addressed by the school district based upon the professional judgement of district administrators using district standards regarding school over-crowding may alter the school attendance boundaries and attendance times of affected schools.

The hearing record contains no evidence regarding how four homes would generate a significant adverse impact upon the district or any particular school (recall, that the Washington Administrative Code considers a “significant adverse impact” to be “more than moderate”.) On the contrary, the evidence in this record suggests that, using the Lake Washington School District’s enrollment generation parameters, this subdivision will generate 1.78 elementary students, 0.6 junior high school student (totaling 2.94, or approximately 3, students), when fully built out.

7. Air Quality. The Appellant argues that intersections serving the proposed development already exceed federal ambient air quality standards for carbon monoxide during peak traffic periods. Over-all regional air quality standards are set at the Federal level. In this jurisdiction, the Puget Sound Air Pollution Control Agency monitors air quality and emissions with respect to those Federal standards. Vehicle emissions are regulated by the Washington State Department Of Ecology. Although the Appellant’s allegation regarding existing circumstances at a particular intersection may be accurate, the hearing record does not establish that the vicinity of the subject property or the intersection of concern is located within a Federal noncompliance area. Further, the hearing record does not show how the vehicle trip generation from this proposed four lot (four residence) development, approximately forty trips per day using Institute of Traffic Engineering (ITE) trip generation data commonly used by the Department and by transportation planners/engineers, would generate an adverse environmental impact which exceeds “moderate effect”.
8. Erosion, Landslide and Water Quality Hazard. The Appellant expresses concern that erosion, landslide and water quality hazards may result from the proposed development, based upon his understanding of proposed detention pond and water discharge plans.

The Department required the Applicant to provide a “Level One” drainage analysis, based upon the requirements of the King County Surface Water Management Design Manual. This analysis, conducted by licensed professional engineers with drainage expertise, and reviewed by one of the Department’s senior engineers, resulted in a variety of drainage conditions being placed upon the Applicant. These conditions regulate site-specific drainage conditions including location discharge, further off-site analysis, run-off control, conveyance method, erosion/sedimentation control, as well as maintenance/operation, and liability. The preliminary approval also imposes “special requirements” upon the Applicant (requirements which make the Applicant responsible for complying with East Sammamish Community Plan P-Suffix drainage conditions and for delineating 100 year flood plain boundaries for on-site wetlands). The hearing record contains no evidence directed toward a demonstration that any of these requirements are erroneous or inadequate. The potential for flooding along NE 8th Street is reviewed in finding no. 10, below.

9. Student Walking Conditions. The Appellant argues that NE 8th Street, which provides vehicular access to the proposed development, is not safe for students who walk to school,

particularly Inglewood High School. King County Road Standards (KCRS) section 1.03 makes the Applicant responsible for improving roads in accordance with KCRS standards when “any land

development . . . will impact the *service level, safety* or *operational efficiency* of serving roads . . . (emphasis added).” There is no evidence in this hearing record, or even argument, that the proposed development will effect the level of service (LOS) or operational efficiency of NE 8th. Rather, the issue to be addressed is whether the proposed short subdivision containing four lots will “impact” the safety of NE 8th Street in a manner which exceeds a moderate effect. RCW 59.17.110 requires the responsible reviewing agency to “consider” safe walking conditions for students and to make “appropriate” provisions. RCW 59.17.110 does not require disapproval or delay of any proposed plat or short plat based upon any particular standard, or vehicle trip generation or student trip generation parameter.

10. Flooding; Emergency Access. NE 8th Street provides the only access route to the proposed development. It floods intermittently, from four to six times per year. By “flooding” it is meant that, standing water on the roadway usually reaches a twelve inch depth during flood periods, and sometimes reaches eighteen inches in depth. King County Surface Water Management Division, and/or the King County Roads Division, have accepted responsibility for correcting this deficiency. The Appellant argues that the proposed development should be required to provide a second access route to the short subdivision unless the NE 8th Street seasonal flooding is corrected. The Department’s senior engineer, having reviewed site and vicinity circumstances, as well as the Applicant’s conceptual drainage plans, concludes that the proposed development will not exacerbate the seasonal flooding of NE 8th Street. That is, the flooding (which may continue until the County Surface Water Management and Roads Divisions successfully complete their resolve to correct the situation) is neither caused by, nor worsened by, the proposed development.

The King County Metropolitan Council is not unaware of the “adequate emergency access” issue. Applying (or establishing) a rule of reason, the Council adopted KCRS 2.20, which requires a second access route for roads serving 100 lots or more. This hearing record does not contain any indication that NE 8th Street meets this standard, with or without the proposed development.

11. Environmental Standard of Review. Section D of the Division’s October 24, 1997 preliminary report to the King County Hearing Examiner (exhibit no. 2) cites the scope and standard of review to be considered by the Examiner. The Division’s summary is correct and will be used here. In addition, the following review standards apply:
 - a. WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Environmental Division), when making threshold determinations, to consider mitigating measures that the agency or applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.
 - b. RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to “substantial weight”. Having reviewed this “substantial weight” rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn 2d 267 (1976), determined that the standard of review of any agency “negative threshold determination” is whether the action is “clearly erroneous”. Consequently, the administrative decision should be modified or reversed if it is :

. . . clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order.

CONCLUSIONS:

1. As noted in finding no. 11, above, the burden of proof falls on the Appellant in a threshold determination appeal. Considering the preponderance of the evidence, the Appellant has not successfully borne that burden in this case. Considering the above findings of fact and the entire hearing record, it must be concluded that the Department's threshold determination in this matter is not clearly erroneous and therefore cannot be reversed.

The presentation of issues, questions and concerns is not sufficient to overturn a threshold determination. Rather, the determination (and the appeal review of that determination) must be based upon the preponderance of the evidence. The preponderance of the evidence in this case supports the Department's determination.

2. Some of the issues raised by the Appellant are valid reasons for concern; particularly, the NE 8th Street flooding. However, they do not approach the magnitude requisite for a determination of significance. And, in the case of NE 8th Street, the Department has used its authority pursuant to WAC 197-11-350(1), -330(1)(c) and/or -660(1)(3) properly, based upon the known intentions of King County Department of Transportation and King County Water and Land Resources Division.
3. In addition, the following conclusions apply:
 - a. There is no indication in the record that the Division erred in its procedures as it came to its threshold declaration of nonsignificance. Rather, the Appellant differs with the Department's assessment of impacts or the probability of potentially adverse impacts. Speculation with respect to potential impacts cannot prove a probable significant impact that requires the responsible agency to be overruled or to alter its initial determination.
 - b. Although the Appellant argues that the information on which the Department based its determination was insufficient, there is no adequate demonstration that the information on which the Division based its determination is actually erroneous.
 - c. There is a substantial amount of information in the record regarding the various impacts which have been asserted by the Appellant. The Department has not been unaware of these issues and has investigated (and reinvestigated) them, but has arrived at conclusions which differ from the Appellant's. The Department, having had access to the variety of issues and points of view and information expressed by the Appellant and others, maintains its original determination of nonsignificance. The Department's judgement in this case must be given substantial weight.
 - d. In view of the entire record as submitted and in view of the State Environmental Policy Act, the Department's decision is not clearly erroneous and is supported by the evidence.

DECISION:

A. **SHORT SUBDIVISION APPEAL.** This hearing record is devoid of any evidence that the Department failed to apply applicable short subdivision requirements. The appeal is DENIED. The Department's preliminary approval is AFFIRMED.

B. **SEPA THRESHOLD DETERMINATION APPEAL.** The appeal is DENIED. The Department's threshold determination of nonsignificance (DNS) of March 12, 1996 is AFFIRMED.

ORDERED this 13th day of November, 1997.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 13th day of November, 1997, to the parties and interested persons indicated on the attached list:

NOTICE OF RIGHT TO APPEAL
Threshold Determination Appeal Decision
Short Subdivision Appeal Decision

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding short subdivision and SEPA appeals.

MINUTES OF THE OCTOBER 24, 1997, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L94S0083 – BUCHAN HOMES SHORT SUBDIVISION APPEAL & SEPA THRESHOLD DETERMINATION APPEAL:

R. S. Titus was the Hearing Examiner in this matter. Participating at the hearing were Steve Gula, Greg Allan, Christopher I. Brain, Jim Szabo, Dave Sandstrom, Angelica Velasquez, Barbara Heavey, and Jim Chan.

On October 24, 1997, the following Exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Department of Development and Environmental Services file no. L94S0083/Short Plat and E95E0063/SEPA
- Exhibit No. 2 DDES preliminary report, prepared for the October 24, 1997 public hearing of Buchan Homes/L94S0083 SEPA and short plat appeals
- Exhibit No. 3 Application dated December 22, 1994
- Exhibit No. 4 Assessor's map: quarter section SE 26-25-6 & 25-25-6 (section)
- Exhibit No. 5 Preliminary approval report dated July 11, 1997
- Exhibit No. 6 Appeal letter dated July 21, 1997 (short subdivision)
- Exhibit No. 7 Appeal letter dated March 18, 1996 (SEPA)
- Exhibit No. 8 Environmental checklist received December 22, 1994
- Exhibit No. 9 Affidavit concerning sensitive areas compliance, dated December 11, 1994
- Exhibit No. 10 Preliminary Health Certificate, dated November 24, 1994
- Exhibit No. 11A Settlement agreement between Gregory Allan and Buchan Construction, received August 13, 1996
- Exhibit No. 11B Map
- Exhibit No. 12 Wetland assessment of Crosse Creek Tract "A" received December 28, 1995
- Exhibit No. 13 Level one drainage analysis dated December 8, 1994
- Exhibit No. 14 Memo from Mason Bowles to David Sandstrom, dated May 23, 1997
- Exhibit No. 15 Segment of East Sammamish Community Plan, pages 127 through 137
- Exhibit No. 16 Segment of Beaverdam DEIS, pages 3-25 and 3-26
- Exhibit No. 17 *not accepted*
- Exhibit No. 18 Memo, dated October 22, 1997, from Rich Hudson/DDES, to Angelica Velasquez/SEPA, re: PSAPCA evaluation of site

RST:vam

Sepa/194/194S0083 Buchan Homes report